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In the Supreme Court of the United States

OCTOBER TERM, 1988

WELLS REAL ESTATE, INC.,
PETITIONER,

v.

GREATER LOWELL BOARD OF REALTORS, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents—the National Association of Realtors, the Massachusetts Association of Realtors, the Greater Lowell Board of Realtors, and members of the Lowell Board—oppose the petition of Wells Real Estate, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.[1]

[1] The information concerning respondents required by Rule 28.1 of the Rules of this Court is set forth at page 1a of the Appendix hereto.

STATEMENT

Since this case presents a very particular set of facts and an extensive procedural history, neither of which is revealed by the petition, this opposition presents its own summary statement.

Petitioner, Wells Real Estate, Inc. ("Wells"), was incorporated in 1959 and operated thereafter as a real estate broker principally in two towns in the vicinity of Lowell, Massachusetts, a city in the northeastern part of the state. Wells was started by George K. Livadas, its sole officer and principal shareholder, who directed its activities until Wells was dissolved in 1979 for failure to file state tax returns and to pay taxes.

Wells had a particular style of conducting its brokerage business, which was to secure its own residential listings and to sell the listed properties without cooperating with any other broker. In the entire time of petitioner's existence, a period spanning twenty years, Livadas cooperated (or "co-broked") with another broker on the sale of a house at most three times. As the Court of Appeals observed in its opinion, "Livadas preferred the old fashioned method, whereby everyone hunted down his own listings and had to be quick to close sales in order to beat the other brokers to the punch." (Pet. App. 4a).

Because Livadas did not believe in broker cooperation, he never joined or sought to join the Greater Lowell Board of Realtors or its multiple listing service, even though he was eligible for membership. The multiple listing service, a system founded on broker cooperation,[2] was anathema to Livadas, as his description of the MLS graphically illustrates:

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[2] The Court of Appeals described the operation of a MLS in its opinion (Pet. App. 3a):

> In particular, the Board provided a "multiple listing service" ("MLS"), which enabled member brokers to cooperate on the sale of a much larger number of houses than if they remained independent. Board members submitted their procured listings for houses to the Board. The list of all of the members' houses was then available to the entire membership to try to sell. When a house was sold, the profit would be split in some agreed upon percentage between the listing broker and the selling broker.

> [Before the MLS] it was real competition. And the good ones survived and the lazy ones would die. But today you have the opposite, . . . the parasites. The lazy ones survive because the system allows them to survive.

The terms used by Livadas to describe the MLS demonstrate that his dislike of the MLS had nothing to do with any of its rules, regulations or requirements; indeed at no time did he communicate to anyone in the Board any objections to its requirements or to those of its MLS. Rather his dislike was with the fact that the MLS existed at all. The MLS system made it easier for new brokers to enter the field by giving them an instant portfolio of houses to show and sell. It thereby increased the number of Wells' competitors in a way which would not have been possible if each new broker first had to assemble a separate set of residential listings. The MLS also was attractive to buyers and sellers of homes, since it substantially broadened the exposure of homes available for sale.

Although petitioner had a substantial share of the Lowell area market in the mid 1960's, its market share began to decline thereafter. In 1972, petitioner brought suit in the United States District Court for the District of Massachusetts under sections 1 and 2 of the Sherman Act against the Greater Lowell Board of Realtors and some sixty brokers who were its members. Petitioner also sued the National Association of Realtors and the state associations of Realtors in Massachusetts and New Hampshire (a state where Wells had never done business). Petitioner alleged a group boycott, a conspiracy to monopolize, the existence of an illegal tying arrangement, and price fixing. The New Hampshire Association was later dismissed by the District Court as a defendant.

In 1973, petitioner instituted a separate antitrust action against all of the other local real estate boards in Massachusetts, some twenty-five in number, extending from

Cape Cod to the New York state line. With few exceptions, Wells had never sold houses or even attempted to establish brokerage operations in the areas covered by these other boards.

Fifteen years after the first action was commenced, a consolidated trial of these cases began in January, 1987. At the outset of trial, petitioner dismissed its claims against all but five of the local boards in the 1973 case. At the close of petitioner's evidence, which consumed twenty-two trial days, the District Court directed a verdict for all the remaining boards in the 1973 case.

At the close of all evidence in the 1972 case, involving a total of twenty-six trial days, the District Court directed a verdict against petitioner on its tying claim, leaving only petitioner's group boycott and conspiracy to monopolize claims.[3] These claims were submitted to the jury on special questions as to respondents Greater Lowell Board, its members, and the National and Massachusetts Associations of Realtors. The jury answered no special questions as to respondents National Association of Realtors and Massachusetts Association of Realtors adversely. The jury also concluded as to all respondents that petitioner had failed to establish the causation elements of its claim, and had failed to establish the requisite effect on interstate commerce. With respect to the conspiracy to monopolize claim, the jury found no specific intent. Based on the jury's answers, the District Court entered judgment for all respondents.

The Court of Appeals for the First Circuit affirmed. As to petitioner's group boycott and conspiracy to monopolize claims, the Court of Appeals ruled that the jury's negative findings on interstate commerce were dispositive (Pet. App. 6a-20a). It rejected a challenge by petitioner to the language of

[3] The District Court had previously granted summary judgment against petitioner on its price-fixing claim in 1984. The petitioner did not challenge the entry of that summary judgment in its appeal to the First Circuit. Thus, the repeated references by Wells in its petition for certiorari to alleged price-fixing are quite irrelevant.

the District Court's charge on interstate commerce, finding that petitioner had failed to object to the charge when given. The Court of Appeals also rejected a challenge to the sufficiency of the evidence to support the jury's interstate commerce finding, since petitioner had not moved for a directed verdict, for judgment notwithstanding the verdict, or for a new trial, nor had it asked the District Court in any way to withhold the interstate commerce issue from the jury (Pet. App. 12a-15a). Finally, the Court of Appeals rejected a belated contention by petitioner that the District Court should have decided the interstate commerce issue because it was "jurisdictional," a point raised by petitioner for the first time in its reply brief in the Court of Appeals. The Court of Appeals concluded that the issue was properly one for the jury and, in any event, that petitioner had waived the point by its failure to object to the submission of the interstate commerce issue to the jury (Pet. App. 15a-20a).

The Court of Appeals also affirmed the directed verdict entered at the close of evidence on petitioner's tying claim (Pet. App. 20a-24a), concluding that petitioner had failed to establish the existence of a separate market for the alleged tied product (real estate board membership) apart from the alleged tying product (MLS access). Though resting its decision on that ground, the Court of Appeals also expressed doubt that MLS access and Board membership were separate products at all, characterizing the MLS as simply "one of the advantages gained by joining that trade organization." (Pet. App. 24a).

REASONS FOR DENYING THE WRIT

The petition does not satisfy any of the recognized reasons for granting certiorari. It is, in large measure, an effort to have this Court decide issues which either were not raised below or were waived by petitioner. The two questions presented are ambiguous, highly dependent on the particular facts of this case, and raise no general issues of sufficient importance to

warrant review by this Court. The decision of the Court of Appeals affirming the judgment of the District Court is fully consistent with the decisions of this Court and of other courts of appeals.

1. The jury's findings that petitioner failed to establish the requisite effect on interstate commerce are dispositive of petitioner's group boycott and conspiracy to monopolize claims. Petitioner has failed to preserve any challenge to those findings. As the Court of Appeals held, and as petitioner now appears to concede, petitioner failed to make or preserve objections to the District Court's instructions to the jury on the interstate commerce issue, or to the sufficiency of the evidence to support the jury's findings (Pet. App. 6a-15a). Presented with these obvious procedural waivers, the petitioner attempted to argue for the first time in its reply brief in the Court of Appeals that the interstate commerce issue should not have been presented to the jury because the issue relates only to subject matter jurisdiction, an argument which the Court of Appeals correctly held was wrong as a matter of law, and in any event waived by petitioner (Pet. App. 15a-20a).

Undaunted, the petitioner now asserts the novel proposition that plain error of petitioner's counsel—not plain error of a court—should cause the jury's answers to be disregarded. Through this proposition, petitioner suggests that the First Circuit's decision in *Cordova & Simonpietri Insurance Agency, Inc.* v. *Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981), did not correctly interpret the interstate commerce standards established in this Court's *McLain* decision and that the interstate commerce issue is too complex for a jury to decide (Pet. 25). Of course, neither of these points was raised in either the District Court or the Court of Appeals, and they are waived. Moreover, they are baseless since *Cordova* is fully consistent with *McLain* and was repeatedly cited by petitioner's counsel in the District Court and the Court of Appeals as defining the correct legal standard on interstate commerce.

The interstate commerce question is no more complex than other questions in antitrust cases to which parties are of course entitled to a jury determination. Petitioner's linchpin proposition—"plain error" of counsel—through which it would seek to raise these hitherto unsuggested points, is no more than a mischievous characterization, by which petitioner's counsel attempts to disregard the established rules for the trial of jury cases. It is no basis for granting a petition.[4]

2. The Court of Appeals' decision to affirm the directed verdict entered against petitioner on its tying claim rests on a principle as to which there is no split in the circuits: there can be no anti-competitive effects flowing from an alleged tying arrangement absent a real or potential market for the tied product. The Court of Appeals' decision is wholly consistent with this Court's decision in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), where the Court held that "no tying arrangement can exist unless there is a sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify *a distinct product market* in which it is efficient to offer [the tied product] separately from [the tying product]." *Id.* at 21-22 (emphasis added).

Petitioner introduced no evidence whatsoever as to any distinct market for trade association services, the demand for trade association services, or the way in which respondents' alleged tying arrangement would affect competition in trade association services. As *Jefferson Parish* teaches, for a *per se* claim there must be a showing of "a substantial potential for impact on competition" and for a rule of reason claim there must be a showing of an "actual adverse effect on competition." 466 U.S. at 16, 31. Here there was a showing of neither. Acknowledging its failure to introduce evidence, peti-

[4] Respondents do not in any way concede that the evidence was sufficient to establish the interstate commerce element of petitioner's Sherman Act claims. The few isolated pieces of unquantified and unspecific proof on which petitioner relies provide a wholly insufficient basis to establish the requisite effect on interstate commerce.

tioner now contends that the District Court improperly excluded proof of what petitioner terms "a newly formed real estate board in the relevant market." (Pet. 16). The evidence in question is proffered testimony that sometime in 1972 or 1973 five real estate brokers in the Lowell area sat around a table at a local restaurant and discussed the possibility of forming a new trade association with a new multiple listing service, a proposal which did not materialize. Yet, petitioner did not raise this evidentiary ruling as an issue before the Court of Appeals, even though it now characterizes the District Court's ruling as the "death blow" to its tying case (Pet. 17). The petitioner's failure to raise this ruling as an issue on appeal is noteworthy since petitioner devoted an entire section of its brief before the Court of Appeals to alleged "evidentiary errors by the trial court." Petitioner thus has waived any challenge to the District Court's ruling.

The proffer was in any event both speculative and trivial. The offer of proof did not indicate why the proposal to have a competing board and MLS did not go forward, or that there was any interest among brokers in joining such an organization. Petitioner's proffered testimony also belies any inference that a competitive trade association would operate separately from a multiple listing service, as the proffer clearly suggests that the prospective trade association would operate in *conjunction* with a multiple listing service. In short, the proffered evidence was properly excluded and would have had no probative effect even if admitted.[5]

[5] It should also be noted that Wells in its petition for certiorari has altered the transcript of the offer of proof. The transcript, which is set out at Pet. App. 53a, indicates that petitioner's counsel answered "No" when asked by the District Court whether "they ever set up a competing board?" In its petition for certiorari, however, petitioner has inserted a "[sic]" after counsel's answer, thus changing the "No" to a "Yes" (Pet. 17). However, petitioner made no motion to change the transcript in the District Court, and the insertion of a "[sic]" at this stage is highly improper.

It is also interesting to compare petitioner's current characterization of this offer of proof with the following description contained in its statement of

The Court of Appeals' decision should also be affirmed on three other grounds. First, the petitioner did not show that Board membership and MLS are two separate products, for the reasons discussed by the Court of Appeals in its opinion:

> The defendant boards are not "sellers" in the usual sense of the term, but rather a trade organization. The MLS is one of the advantages gained by joining that trade organization.

(Pet. App. 24a). Second, as the Court of Appeals noted (Pet. App. 23a n.10), "there is no reason to think that the jury's verdict on the interstate commerce element of the tying claim would have differed from those it rendered on the other claims." Finally, Wells should not have standing to prosecute this claim since it never joined, attempted to join, or even desired to join the Board or its MLS. Indeed, the record below clearly showed that petitioner's own business practices were antithetical to participation in the Greater Lowell Board's multiple listing service and that petitioner would not have joined the Greater Lowell Board, regardless of membership requirements, dues structure or association services.

What petitioner attempts, in a desperate effort to avoid the preclusive effect of the jury's verdicts on its group boycott and conspiracy to monopolize claims, is to reassert all of its contention as to those claims in the guise of a tying claim. This transformation of petitioner's tying claim is extraordinary, since petitioner devoted but three pages to this claim in its brief before the Court of Appeals. Despite petitioner's present efforts at masquerade, this is not a tying case and presents no issues of tying law worthy of this Court's review.

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facts to the Court of Appeals: "In the early 1970's, a group of Realtor members of the Greater Lowell Board's MLS together with Mr. Livadas discussed the possibility of forming a competing non-realtor MLS as well as a real estate board. . . . *The proposal did not materialize.*" Appellant's Br. at 16 (emphasis added). Clearly, the petitioner's current assertion that the competing board was formed is an afterthought not supported by the record.

3. Petitioner would have this Court grant the writ, based on two highly ambiguous and fact specific questions, and then present not only those two questions, but every question addressed to the Court of Appeals, and many that were not.[6] Petitioner ignores the reality that this was a case addressed to specific facts at a particular point in time. It does not seek review of this case, but asks for an unprecedented species of declaratory judgment which would disregard the record below.[7] Petitioner's invitation to depart from all accepted limits on review by this Court should be summarily rejected.

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[6] The petition closes with an invitation to "accept the petition for consideration of the substantive issues addressed on appeal to the First Circuit but which . . . were generally unaddresssed by the First Circuit due to waivers of petitioner's counsel . . . ." (Pet. 28). If the petition were granted, respondents would present as alternative grounds to sustain the judgment a number of points which they did present to the Court of Appeals and which the court did not reach, including the jury's equally dispositive findings on causation and specific intent, the total failure of petitioner's proof on damages, and petitioner's lack of standing to prosecute these claims.

[7] The assertion that this case will provide a vehicle "to examine the legality of the governing rules and practices of the behometh [sic] National Association of Realtors" (Pet. 27), is fatuous in the light of the fact that the jury did not with respect to respondent National Association of Realtors answer any special question adversely.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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October 20, 1988

APPENDIX A

Statement Required by Rule 28.1

1. *National Association of Realtors:*

The National Association of Realtors has no parent or subsidiary corporations. Listed below are all the corporations affiliated with National Association of Realtors, each of which is a non-profit, membership corporation under Illinois law:

American Institute of Real Estate Appraisers of the National Association of Realtors
American Society of Real Estate Counselors of the National Association of Realtors
Institute of Real Estate Management of the National Association of Realtors
Society of Industrial and Office Realtors of the National Association of Realtors

2. *Massachusetts Association of Realtors:*

The Massachusetts Association of Realtors has no parent companies, subsidiaries or affiliates.

3. *Greater Lowell Board of Realtors:*

The Greater Lowell Board of Realtors, Inc., has no parent companies, subsidiaries or affiliates.

4. *Members of the Greater Lowell Board:*

The following members of the Greater Lowell Board of Realtors, Inc., have no parent companies, subsidiaries or affiliates:

Walter W. Arakelian d/b/a Arakelian Real Estate, George C. Ayotte, Francis M. Bakkar, John Banacos, Walter E. Bartkus, Gloria J. Brown, James A. Burns, Jr., Gilbert G. Campbell, Inc., Richard A. Geiger, Edward F. Chambers, Roger Clermont, James A. Kintigos,

Dave Councilman, Ellis Davis, Martin F. Delmore d/b/a Martin Delmore Real Estate & Insurance, Gail Downing, Anne Marie Dube d/b/a Marie Dube Real Estate, George R. Dupee, Peter De Mogenes, Rene E. Gendreau, Peter J. Georges d/b/a Georges Real Estate & Insurance, T. J. Higgins Insurance Agency, Inc., Frank E. Jackson Realty, Inc., Henrick F. Johnson, Roy T. Johnson, Douglas R. Johnston, Ann R. Jones, John J. Lowery, C. A. Mack Assoc., Inc., Peter Markham, Arthur E. McGlinchy, George D. Meser-vey, W. C. Muldoon d/b/a W. C. Muldoon Realty, Musket Realty, Inc., Newsham Real Estate, Inc., Robert L. O'Brien, J. J. Reardon d/b/a J. J. Reardon Insurance & Real Estate Agency, Lawrence A. Ross and Dorothy M. Ross d/b/a Ross Real Estate & Insurance Agency, Howard N. Sager d/b/a Sager Real Estate, J. R. Saran, Francis W. Stecchi, Edward J. Talbot, Jr. d/b/a Talbot Insurance & Real Estate, Van Greenby Realty Sales, Inc., Roger P. Welch, Terry Witt

The following members of the Greater Lowell Board of Realtors, Inc., have reorganized and their parent companies, subsidiaries and affiliates are as noted:

William D. Atherton Realty Corp. is now Atherton Zabbo Realty Corp.; Bradford O. Emerson, Inc., is now a subsidiary of the DeWolfe Companies, Inc.; and Buckingham Real Estate, Inc., is a subsidiary of Prudential Real Estate, Inc.